IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. FERNANDO RAY LOPEZ, Appellant.	2 CA-CR 2006-0122 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20043576

Honorable Howard Hantman, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Kathryn A. Damstra
Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Robb P. Holmes
Tucson
Attorneys for Appellant

H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Fernando Ray Lopez was convicted of multiple offenses arising from a home invasion and his flight from police two days later and sentenced to prison terms totaling 91.25 years. On appeal, he argues the trial court erred by denying

his motion to sever the counts related to the home invasion from the counts related to his later flight, by admitting evidence of the words in his tattoos, and by refusing to grant his motion for a mistrial based on the suggestion he had committed uncharged acts. Finding no error, we affirm.

¶2 We view the facts in the light most favorable to sustaining the convictions, resolving all reasonable inferences against the defendant. *See State v. Riley*, 196 Ariz. 40, ¶ 2, 992 P.2d 1135, 1137 (App. 1999). On the morning of September 15, 2004, three men entered the victims' home. An armed man confronted Andrea, demanding money, guns, and jewelry. She noticed that the man had a tattoo in "Old English" lettering on each calf and, although she could not make out the words, she did testify that one tattoo contained the letter "N." At trial, Andrea identified the man with the calf tattoos as Lopez.

¶3 Later, Andrea's father, Robert, returned from a bicycle ride and saw a blue Kia outside the house. He thought it might have belonged to a friend of Andrea's and entered the house through the garage. Once inside, a man he identified at trial as Lopez put a gun to his head and demanded money, jewelry, and guns. Lopez also hit Robert with the gun several times. The men bound both victims with duct tape. Robert could also see tattoos of words on Lopez's legs but could not see all the letters. The men eventually left, and Robert called police, who arrived soon thereafter.

¶4 Outside the garage, a detective found a name tag with the name Denise S. on it. The detective spoke with Denise on September 16. Denise testified that Lopez had used her car, a blue Kia, on September 14, and had not returned it. She had attempted to report

it stolen, but police told her the car had not been gone long enough. After the detective talked with Denise, Denise reported the car stolen.

¶5 At about 1:30 a.m. on September 17, 2004, two Tucson Police Department officers saw a Kia and one officer noted that the driver looked suspicious. The other officer checked the license plate number in their computer system and learned the car had been reported stolen. They began to follow it, and, ultimately, a chase ensued.

¶6 Eventually, the police were able to disable the Kia using road spikes, and Lopez got out of the driver's seat. Lopez took out a knife and stabbed a police dog that was attempting to subdue him. Police arrested Lopez, and a search of the Kia turned up, among other property, antique coins that Robert identified as having been of the same kind as those taken from his home.

¶7 Lopez first argues the trial court erred by denying his pre-trial motion to sever the trial of the offenses related to the flight from law enforcement from the trial of the offenses related to the home invasion.[1] But Lopez failed to renew his motion at trial before the close of evidence. A motion to sever must be "renewed during trial at or before the close of the evidence." Ariz. R. Crim. P. 13.4(c), 16A A.R.S. The failure to do so forfeits the claim absent fundamental error. *See State v. Laird*, 186 Ariz. 203, 206, 920 P.2d 769, 772

[1]In each argument, Lopez makes constitutional arguments that were not raised below and are not sufficiently developed here. They are therefore forfeited and waived. *See State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 n.9 (2004) (failure to argue claim constitutes abandonment of claim); *State v. Spreitz*, 190 Ariz. 129, 145, 945 P.2d 1260, 1276 (1997) (appellate court may properly decline to consider constitutional claims raised for first time on appeal).

(1996). Lopez further complains that the trial court did not give a limiting instruction on the use of the evidence of the two groups of crimes. But because he did not request a limiting instruction at trial, he has forfeited his claim to appellate relief, absent fundamental error. *See* Ariz. R. Crim. P. 21.3(c), 17 A.R.S.; *State v. Ellison*, 213 Ariz. 116, ¶ 61, 140 P.3d 899, 916, *cert. denied*, ___ U.S. ___, 127 S. Ct. 506 (2006). Accordingly, we will review these claims only for fundamental error.

¶8 Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005), *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20.

¶9 In opposing the motion to sever, the state argued that Lopez's offenses committed on different days were "otherwise connected together in their commission." Ariz. R. Crim. P. 13.3(a)(2), 16A A.R.S. "The 'otherwise connected together in their commission' language addresses whether evidence of the two crimes was so intertwined and related that much the same evidence was relevant to and would prove both, and the crimes themselves arose out of a series of connected acts." *State v. Prion*, 203 Ariz. 157, ¶ 32, 52 P.3d 189, 194 (2002), *quoting* Ariz. R. Crim. P. 13.3(a)(2). The trial court was required to sever the offenses if "necessary to promote a fair determination of the guilt or innocence of any defendant of any offense." Ariz. R. Crim. P. 13.4(a), 16A A.R.S.

¶10 To show fundamental error, Lopez must first show error. *See Henderson*, 210 Ariz. 561, ¶ 23, 115 P.3d at 608. We review the denial of a motion to sever for abuse of discretion. *State v. Hummer*, 184 Ariz. 603, 608, 911 P.2d 609, 614 (App. 1995). Lopez admits that some evidence from the two groups of offenses overlapped because the same car was involved and coins like those stolen from the home were found in the car after the flight from police. This evidence was relevant to the home invasion charges because it tended to show that Lopez was involved in the invasion. *See* Ariz. R. Evid. 401, 17 A.R.S. ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); *cf. State v. Harding*, 137 Ariz. 278, 290, 670 P.2d 383, 395 (1983) (defendant's possession of murder and robbery victim's property permitted inference that defendant "obtained [the property] . . . as a result of the murder and robbery").

¶11 Additionally, the state points out that the evidence of the flight was relevant to show consciousness of guilt of the home invasion. *See State v. Kemp*, 185 Ariz. 52, 59, 912 P.2d 1281, 1288 (1996) (evidence of kidnapping and robbery committed after murder admissible to show consciousness of guilt); *State v. Thompson*, 108 Ariz. 423, 424, 501 P.2d 7, 8 (1972) ("Flight is relevant to show consciousness of guilt."). Although Lopez claims he may have had other reasons to flee, evidence presented at trial supported the state's version of the facts, and it was entitled to present that version for the jury's consideration. *Cf. State v. Williams*, 183 Ariz. 368, 376-77, 904 P.2d 437, 445-46 (1995)

(consolidation proper where there was evidence that defendant's motive for shooting was to silence a witness; "possible alternative explanations for the shooting . . . [went] to the weight of the evidence, not to its admissibility"). Under these circumstances, we cannot say the trial court abused its discretion in denying Lopez's pretrial motion to sever. *See Hummer*, 184 Ariz. at 608, 911 P.2d at 614 (denial of severance reviewed for abuse of discretion). Accordingly, Lopez has failed to show error.

¶12 Moreover, we note that, although the jury was not given a specific limiting instruction to consider the crimes in each episode separately, the jury was instructed to consider the evidence of each offense independently and that the state bore the burden of proving each element of each offense beyond a reasonable doubt. We presume the jury followed the instructions. *See State v. Newell*, 212 Ariz. 389, ¶ 69, 132 P.3d 833, 847, *cert. denied*, ___ U.S. ___, 127 S. Ct. 663 (2006). Thus, we find no fundamental error resulted from the absence of a more specific limiting instruction. And, even if Lopez could show error that could be characterized as fundamental in the lack of such instruction or failure to sever, he could not carry his burden to show that any error prejudiced him. *See State v. Martinez-Villareal*, 145 Ariz. 441, 446, 702 P.2d 670, 675 (1985) (finding "no prejudice in the joinder of the offenses" where "jury was properly instructed to consider each offense separately, and they were advised that the state had to prove an offense beyond a reasonable doubt").

¶13 Lopez next argues that the trial court erred by admitting evidence that Lopez had a tattoo on each of his calves; one that said "nasty" and another that said "freak."

Lopez claims that any probative value the tattoos may have had was substantially outweighed by the danger of undue prejudice under Rule 403, Ariz. R. Evid., 17A A.R.S. But Lopez stipulated to the admission of a photograph of the "nasty" tattoo, and although this stipulation was apparently an attempt to prevent admission of the photograph of the "freak" tattoo, Lopez did not object to admission of the photograph of the "nasty" tattoo after the close of evidence, when the court admitted the photograph of the "freak" tattoo. Therefore, we review the admission of the photograph of the "nasty" tattoo for fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607 (fundamental error review applies when defendant fails to object at trial).

¶14 Lopez objected to the admission of the photograph of his "freak" tattoo under Rule 403. Therefore, we review the trial court's admission of that evidence for an abuse of discretion and resulting prejudice. *See State v. Davolt*, 207 Ariz. 191, ¶ 60, 84 P.3d 456, 473 (2004); *State v. Ayala*, 178 Ariz. 385, 387, 873 P.2d 1307, 1309 (App. 1994). Under Rule 403, "evidence may be excluded if its probative value is *substantially outweighed* by the danger of unfair prejudice." (Emphasis added.) "Unfair prejudice results if the evidence has an undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror." *State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997). Even when the nature of a tattoo is prejudicial, it may be "properly admitted as evidence tending to identify [the defendant] as the perpetrator of the crimes." *State v. Sanchez*, 130 Ariz. 295, 300, 635 P.2d 1217, 1222 (App. 1981) (probative value of tattoos "Hate Cops" and "Lonely Drifter" outweighed any prejudice because they tended to identify defendant).

¶15 Here, Robert could not identify Lopez in a photographic lineup the day after the home invasion, and Andrea identified Lopez but stated she was only eighty-seven percent certain of her identification. They both testified, however, that they had seen tattoos of words on Lopez's calves, and Andrea testified that one tattoo contained the letter "N." Lopez cross-examined Andrea and Robert extensively on identity issues and introduced photographs of tattoos on Lopez's arms, which the victims had not seen.

¶16 Under the circumstances, the trial court could have concluded that any potential prejudice did not substantially outweigh the relevance of the tattoos on the issue of identity. *See id.* Furthermore, the trial court could have found that the words "freak" and "nasty" were neither suggestive of criminal activity nor so unduly prejudicial that evidence of the words should not have been admitted. Therefore, the trial court did not abuse its discretion in admitting evidence of Lopez's "freak" tattoo. And Lopez has failed to show either error or the prejudice necessary to establish fundamental error concerning the admission of the photograph of the "nasty" tattoo.

¶17 Lopez also minimally argues that the trial court "compounded th[e] error by not even bothering to give the jury a limiting instruction to use the evidence [of the tattoos] solely on the identity issue." But although Lopez mentioned before trial that, if the pictures were admitted, he would want a "cautionary instruction," the record before us does not reflect that he proposed one, and Lopez did not object to the instructions given. Accordingly, we review this issue for fundamental error. *See Ellison*, 213 Ariz. 116, ¶ 61, 140 P.3d at 916; *cf. State v. Rivera*, 210 Ariz. 188, ¶ 21, 109 P.3d 83, 88 (2005) (although

defendant had proposed certain jury instructions, he did not later object to instructions actually given, and "therefore acquiesced to them"). Because Lopez has not argued he suffered any prejudice by the lack of a limiting instruction, we find no such error.

¶18 Finally, Lopez claims that the trial court erred by denying his motion for mistrial based on alleged references to uncharged sexual abuse. "Declaring a mistrial is the most dramatic remedy for trial error and should be granted only when it appears that that is the only remedy to ensure justice is done." *State v. Maximo*, 170 Ariz. 94, 98-99, 821 P.2d 1379, 1383-84 (App. 1991). But "[t]he general rule is that evidence which indicates serious unrelated prior bad acts of the defendant that would otherwise be inadmissible merits a mistrial." *State v. Grijalva*, 137 Ariz. 10, 14, 667 P.2d 1336, 1340 (App. 1983). We review solely for an abuse of discretion. *State v. Moody*, 208 Ariz. 424, ¶ 124, 94 P.3d 1119, 1151 (2004).

¶19 Andrea testified that during the invasion her "pants kept falling down" and that, an intruder other than Lopez "kept slapping [her] butt and stuff." She also testified that Robert said, "Please don't do anything. Don't harm my daughter." Lopez did not object or move for a mistrial at that point. The next day, Robert testified that, following the invasion, he had asked Andrea if "she had been sexually abused." Lopez then moved for a mistrial, arguing that there was no evidence supporting sexual abuse and that the suggestion of sexual abuse was "very highly prejudicial." The trial court ultimately denied the motion.

¶20 The testimony, taken as a whole, did not suggest Lopez had committed any serious, uncharged offense as Lopez argues. And the testimony concerned a different

intruder, not Lopez. *See Grijalva*, 137 Ariz. at 14, 667 P.2d at 1340 (mistrial appropriate where "evidence . . . indicates serious unrelated prior bad acts *of the defendant*") (emphasis added). The trial court did not abuse its discretion in denying Lopez's motion, and Lopez was not prejudiced.

¶21 For the foregoing reasons, we affirm Lopez's convictions and sentences.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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J. WILLIAM BRAMMER, JR., Judge